

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
DAVID GEORGE :
 :
 Plaintiff, :
 :
 -against- :
 :
 COUSINS PRINTING LLC, :
 TANA SEYBERT LLC :
 :
 Defendants. :
-----X

OPINION
06 Civ. 6135 (RLC)

APPEARANCES

DAVID GEORGE
Pro Se

LITTLER MENDELSON, P.C.
Attorneys for Defendants
885 Third Avenue, 16th Floor
New York, NY 10022

A. MICHAEL WEBER
Of Counsel

ROBERT L. CARTER

Currently before the court is defendants' motion to dismiss the complaint pursuant to Rule 41(b), F.R. Civ. P. For the reasons herein, the court grants the motion to dismiss.

BACKGROUND

On August 8, 2006, plaintiff initiated this lawsuit, alleging that defendants violated the Family and Medical Leave Act of 1993, the New York State Human Rights Law, and the Administrative Code of the City of New York. Defendants answered the complaint by denying the claims against them.

On December 7, 2006, plaintiff's counsel, Jonathan Weinberger, moved to withdraw as counsel because plaintiff refused to communicate with him. The court granted the motion to withdraw on February 27, 2007. The court also ordered plaintiff to "retain new counsel within sixty (60) days of the date of this order: otherwise plaintiff's remaining claims may be dismissed with prejudice."

In June 2007, defendants contacted Weinberger, who confirmed that he had forwarded the February 27, 2007 order to plaintiff. On July 17, 2007, defendants requested permission to file a motion to dismiss the complaint for plaintiff's failure to comply with the February 20, 2007 order and his failure to prosecute his claims against defendants. On July 24, 2007, the court granted defendants' request for permission to file a motion to dismiss. The July 24 order required that defendants file their motion to dismiss by August 27, 2007, and that plaintiff respond to

the motion by September 24, 2007. Defendants filed their motion to dismiss on August 27, 2007. Plaintiff still has not responded.

Discussion

Under Rule 41(b), F.R. Civ. P., dismissal is appropriate where a plaintiff fails "to prosecute or to comply with. . .any order of court." District courts have the "inherent power" to dismiss a case for failure to prosecute under Rule 41(b), F.R. Civ. P. See Link v. Wabash R.R. Co., 370 U.S. 626, 630 (1962). Where there is a pro se plaintiff, the Court of Appeals for the Second Circuit has detailed several factors that district courts should consider before dismissing a complaint pursuant to Rule 41(b), F.R. Civ. P. These factors include the following: 1) the duration of the plaintiff's failures; 2) whether the plaintiff had received notice that further delays would result in dismissal; 3) whether the defendant is likely to be prejudiced by further delay; 4) whether the judge has taken care to strike the balance between alleviating court calendar congestion and protecting due process rights; and 5) whether the judge has adequately assessed the efficacy of lesser sanctions. See Alvarez v. Simmons Mkt. Research Bureau, Inc., 839 F.2d 930, 932 (2d Cir. 1988) (citations omitted).

Plaintiff's failures have endured for over a year. The court permitted plaintiff's former counsel to withdraw from

his representation in its February 27, 2007 order. It also mandated plaintiff to retain new counsel within sixty days of the order. Since April 2007, plaintiff has been in noncompliance with that order and has not retained new counsel. Neither plaintiff nor counsel for plaintiff has contacted defendants or the court since the February 27, 2007 order. One year of noncompliance with the order and non-communication with defendants sufficiently warrant dismissal of plaintiff's complaint. See In Re Michaelesco, 154 Fed. Appx. 230, 231 (2d Cir. 2005) (affirming the dismissal of a pro se plaintiff's claims after plaintiff failed to file a brief for four months after the original deadline, and plaintiff was repeatedly tardy in her filings to the court).

Moreover, plaintiff received notice that his noncompliance with the February 27, 2007 order could result in dismissal of his claims against defendants. The order stated, "Plaintiff is directed to retain new counsel within sixty (60) days of the date of this order; *otherwise plaintiff's remaining claim may be dismissed with prejudice.*" (emphasis added). This was sufficient notice that noncompliance could be fatal to his claims.

Further, defendants have been prejudiced by the delay. The Second Circuit has noted that "prejudice to defendants resulting from unreasonable delay may be presumed." See Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 43 (2d Cir. 1982). More than a year has passed since the February 27,

2007 order. This is unreasonable delay. Defendants have been prevented from conducting discovery, yet still must devote time in communicating with the court regarding this matter.

The court has considered the need to strike a balance between court congestion concerns and plaintiff's due process rights. In this case, plaintiff's failure to comply with the court's order or make an attempt to prosecute this case dismisses his right to have the court hear his claim. See Feurtado v. City of New York, 225 F.R.D. 474, 480 (S.D.N.Y. 2004). Plaintiff has made no effort to comply with the court's orders or to prosecute this case. It would not be fair to the many other litigants awaiting the court's attention to keep this suit on the court's docket, especially because plaintiff has remained silent for one and one-half years.

Finally, dismissal is the only appropriate sanction. The "court should not have to beg the parties before it to litigate the cases they initiate." McLean v. City of New York, 2007 WL 415138, at *4 (Scheindlin, J.). Plaintiff has demonstrated a disinterest in pursuing his claims, and there is no reason to believe that lesser sanctions would encourage him to prosecute his claims.

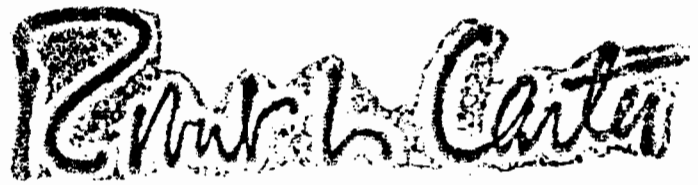
For the aforementioned reasons, defendants' motion to dismiss the complaint with prejudice, pursuant to Rule 41(b), is granted.

CONCLUSION

For the aforementioned reasons, defendants' motion to dismiss the complaint, pursuant to Rule 41(b), F.R. Civ. P., is granted.

IT IS SO ORDERED

DATED: New York, New York
September 2, 2008

A handwritten signature in black ink, reading "Robert L. Carter". The signature is written in a cursive, slightly slanted style. Below the signature is a solid horizontal line.

ROBERT L. CARTER
U.S.D.J.